

NO. 16-35320

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CURTISS WILSON,

Plaintiff/Appellant,

v.

UNITED STATES OF AMERICA, JOHN OR JANE DOE, Director of the
Department of Licensing, a subdivision of the State of Washington, In his/her
official capacity and the STATE OF WASHINGTON, and HORTON'S TOWING,
a Washington Corporation,

Defendants/Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

No. 2:15-cv-00629-JCC
The Honorable John C. Coughenour
United States District Court Judge

BRIEF OF APPELLEE, HORTON'S TOWING.

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CORPORATE DISCLOSURE

Pursuant to FRCP 26.1, Appellee Horton's Towing discloses that it does not have a parent corporation and no publicly traded company owns 10 percent or more of its stock.

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I. INTRODUCTION

Appellant Curtiss Wilson's arguments on appeal are completely unsupportable by the record, the facts, and the law. The single error, as presented by Wilson in the Opening Brief, focuses exclusively upon the merits of Wilson's claim of conversion. However, dismissal of Wilson's claim against Horton's Towing ("Horton's") was based entirely upon principles of comity. Thus, appellant's argument is completely irrelevant with respect to the District Court's ruling on summary judgment; the District Court expressly stated that the merits of the case need not be reached. The narrow issue before this Court is whether dismissal is proper under principles of comity where tribal court jurisdiction is colorable and tribal court remedies have not been exhausted. The District Court correctly dismissed appellant's claim against Horton's. This Court should uphold the District Court's ruling.

II. JURISDICTIONAL STATEMENT

The District Court had subject matter jurisdiction over the original claims in this matter pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §1346 (b), §§ 2671-2680, because appellant Curtiss Wilson asserted tort claims against the United States. Federal courts have original jurisdiction over all civil actions arising under the Constitution, laws, or treaties of the United States. 28 U.S.C. §1331.

The District Court's order granting summary judgment is a final order made pursuant to Fed. R. Civ. P. 56 (a), dismissing the lawsuit with prejudice. This final order was entered on March 29, 2016. Wilson moved for reconsideration. The District Court entered an order denying the motion for reconsideration on April 28, 2016. Wilson timely filed a Notice of Appeal on April 28, 2016, and then filed an Amended Notice of Appeal on May 5, 2016.

The United States Court of Appeals for the Ninth Circuit has jurisdiction of this appeal from the final decision of the District Court pursuant to 28 U.S.C. §1291.

III. COUNTER-STATEMENT OF THE ISSUES

Whether the District Court properly dismissed Wilson's cause of action for conversion against Horton's based upon principles of comity where tribal court jurisdiction is colorable and tribal court remedies have not been exhausted.

Whether Wilson's argument on appeal, which focuses solely on the merits of the conversion claim, fails on its face because the District Court expressly ruled that it did not reach the merits of the claim.

IV. STATEMENT OF THE CASE

This matter arises out of events that occurred after Appellant was arrested for driving under the influence of alcohol and possession of approximately three pounds of marijuana. Wilson was driving on a state highway that passed through

the Lummi Nation Reservation, after drinking at the Lummi Casino, when he was pulled over by a Lummi tribal police officer in Bellingham, Washington. Pursuant to applicable state jurisdictional procedure, the Lummi tribal officer called the Washington State Patrol (“WSP”) to respond and make the arrest. After the arrest was made, Appellee Horton’s Towing was contacted and, at the direction of the WSP, towed the appellant’s vehicle to Horton’s premises and impounded it in the early morning hours of October 23, 2014. ER 21. Later that day, a Lummi Nation tribal officer appeared at Horton’s and presented a Lummi Tribal Court Notice of Seizure. ER 16, 23. Horton’s complied with the Notice of Seizure and released the vehicle to the tribal officer. ER 16. Horton’s had no further involvement in the vehicle and no further contact with the appellant.

Subsequently, the appellant brought three claims against Horton’s under theories of conversion, outrage, and deprivation of civil rights pursuant to 42 U.S.C. §1983. Horton’s moved for summary judgment on all claims. The District Court dismissed Wilson’s outrage and 42 U.S.C. §1983 claims with prejudice. ER 114 – 117. Horton’s brought a second motion for summary judgment on Wilson’s third and final claim of conversion. ER 36-40. In its second motion, Horton’s argued that it had lawful justification for release of the vehicle pursuant to the Lummi Nation Notice of Seizure. *Id.* Defendant/Appellee United States of

America also brought a motion for summary judgment on the conversion claim based on Wilson's failure to exhaust his administrative remedies in the tribal court.

The District Court dismissed the conversion claim with prejudice as to all parties based on principles of comity. ER 4-14. In particular, the District Court recognized that the Lummi Nation has a colorable claim of jurisdiction and Wilson failed to exhaust his remedies in tribal court. ER 8. The District Court did not reach the merits of the conversion claim. ER 7, fn.4. Wilson moved for reconsideration of the second order on summary judgment; the District Court again denied the motion for reconsideration. ER 1-2.

Wilson now seeks appellate review of the District Court's dismissal. As was the case before the District Court on reconsideration, Wilson has not raised any new facts or legal authority on appeal. Rather, all issues raised on appeal stem from a single faulty premise that the District Court ruled on the merits of the conversion claim, and that a ruling on the merits was in error. However, the order granting summary judgment clearly and expressly states that the District Court *did not* reach the merits of the conversion claim. ER 7, fn.4. Therefore, Wilson's argument on appeal fails on its face, and the order granting summary judgment should be affirmed.

V. SUMMARY OF ARGUMENT

The single, dispositive issue on this appeal is whether dismissal of the appellant's claim was warranted under principles of comity. The District Court correctly ruled that the tribal court has colorable jurisdiction and the appellant failed to exhaust his remedies in tribal court. Accordingly, the ruling of the District Court should be affirmed.

VI. ARGUMENT

A. The District Court Properly Found That Wilson Failed to Exhaust Administrative Remedies in Tribal Court and Dismissal Based on Principles of Comity is Warranted.

The appellant argues that the District Court erred in ruling on the merits of his conversion claim. Specifically, the appellant asserts that Horton's released the vehicle without lawful justification because the Lummi Nation Notice of Seizure was not valid, or binding. The District Court expressly declined to reach the merits of the conversion claim because the appellant did not first exhaust his tribal court remedies. ER 7, fn. 4. In the order granting Horton's second summary judgment motion, the District Court clearly explained that "[t]hese questions need not be reached because dismissal is warranted based on principals [sic] of comity." *Id.*

In dismissing the appellant's conversion claim, the District Court correctly found that the Lummi Nation has a colorable claim of jurisdiction where it is undisputed that the transactions forming the basis of the appellant's case "occurred

or were commenced on tribal territory.” ER 8. It is unquestionable that the appellant was stopped by a Lummi tribal police officer while driving on tribal land, after drinking at the Lummi Casino. Appellant expressly acknowledges that these facts, as set forth by the District Court in the order granting summary judgment, are accurate.

Pursuant to stringent exhaustion requirements recognized by the Ninth Circuit, federal courts are required to dismiss or to abstain from deciding claims over which tribal court jurisdiction is “colorable,” provided that there is no evidence of bad faith or harassment. *Marceau v. Blackfeet Hous. Auth.*, 540 F.3d 916, 920 (9th Cir. 2008), *citing*, *Atwood v. Fort Peck Tribal Court Assiniboine*, 513 F.3d 943, 948 (9th Cir. 2008). Exhaustion of tribal remedies is “mandatory.” *Marceau*, 540 F.3d at 920, *citing*, *Burlington N. R.R. Co. v. Crow Tribal Council*, 940 F.2d 1239, 1245 (9th Cir.1991).

The District Court correctly found no indication of bad faith or harassment, or anything pled that would support a departure from Ninth Circuit and Supreme Court precedent. ER 8. Therefore, the District Court correctly ruled that it may not hear the case without providing the tribe the opportunity to first examine the case. *Id.*

While the District Court did, in fact, discuss issues relating to the merits of the claim, it clearly and unequivocally stated that it *did not* reach the merits of the

conversion claim in dismissing the action. ER 7, fn.4. Appellant has also expressly acknowledged this fact in his appellate brief. Hence, by appellant's own admission, his argument that the District Court erred in ruling on the merits of the conversion claim fails. The District Court's order granting summary judgment should be affirmed.

VII. CONCLUSION

For all of the foregoing reasons, Appellee Horton's Towing respectfully requests that this Court affirm the District Court's order granting Horton's motion for summary judgment.

DATED this 2nd day of September 2016.

FORSBERG & UMLAUF, P.S.

By: 

Robert W. Novasky, WSBA #21682

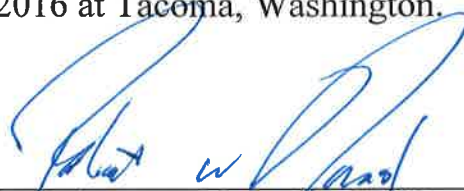
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Attorneys for Appellee Horton's Towing

**CERTIFICATE OF COMPLIANCE
PURSUANT TO CIRCUIT RULE 32-1**

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief is proportionately spaced, has a typeface of 14 points or more and contains 1,955 words.

Dated this 2nd day of September 2016 at Tacoma, Washington.

A handwritten signature in blue ink, appearing to read "Robert W. Novasky", written over a horizontal line.

Robert W. Novasky, WSBA #21682
Lesley J. Fleming, WSBA #32368
Attorneys for Appellee Horton's Towing

STATEMENT OF RELATED CASES

Pursuant to Cir. Rule 28-2.6, Appellee hereby certifies that, the Appellee's knowledge, there are no cases or appeals pending before this Court related to the present appeal.

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the foregoing ***BRIEF OF APPELLEE, HORTONS TOWING, INC.*** on the following individuals in the manner indicated:

I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

SIGNED this 2nd day of September, 2016 at Tacoma, Washington.



Myja O. McMichael